Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 76-1152

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,

Respondent,

v.

MAX KAVALER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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J. JEFFREY WEISENFELD,
On the Petition

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UNITED STATES OF AMERICA,

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v.

MAX KAVALER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Max Kavaler, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 20, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the appendix hereto at (1a).* The opinion of the District Court, which was read into the record and is not officially reported, appears in the appendix at (3a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 20, 1977 and the petition for a writ of certiorari was filed with the Court within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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*References are to the petitioner's appendix and are designated "a".

QUESTION RAISED

Whether the failure of the government to advise either the defense or the court that one of its rebuttal witnesses wished to change her false testimony deprived petitioner of a fair trial?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Indictment S. 76 Cr241, superceding indictment 76 Cr. 110, was filed on March 11, 1976 and charged Dr. Kavaler, in Count I, with having conspired to defraud the United States in regard to the Medical Act and to file false claims in connection with services rendered to patients, in violation of 18 U.S.C. §371. Dr. Kavaler was further charged in Counts 2 through 27, with the substantive crime of having presented false claims with respect to services allegedly rendered to 26 patients, in violation of 18 U.S.C. §287. Counts 28 through 53 charged the same offenses as false statements in violation of 18 U.S.C. §1001.

Trial began on July 19, 1976. At the end of the government's case, the court granted, on the consent of government, a judgment of acquittal on Counts 3, 4, 7, 8, 12, 13, 14, 17, 20, 23, 24, 29, 30, 33, 34, 38, 39, 40, 43, 46, 49 and 50. Prior to submission to the jury, the government chose to proceed on only the false claim counts (2-27). Thus, the jury was presented with only Counts 1, 2, 5, 6, 9, 10, 11, 15, 16, 18,19, 21, 22, 25, 26 and 27.

On July 29, 1976, the jury found Dr. Kavaler guilty of the conspiracy count (Count I) and of all the substantive counts except, Counts 19 and 25.

On September 13, 1976, Dr. Kavaler moved, pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial. On September 17, and 23, 1976 a hearing was held, after which the motion was denied.

On September 29, 1976, Dr. Kavaler was sentenced to concurrent terms of 4 years on each of the fourteen counts of which he was convicted (Brieant, J.).

Dr. Kavaler was at liberty on his own recognizance pending the appeal. A motion for a stay pending the petition for a writ of certiorari to this Court was made but by an order dated February 9, 1977 said motion was denied. On February 14, 1977 Dr. Kavaler surrendered to the Marshall and he is presently incarcerated at the Metropolitan Correctional Center in New York.

THE RECORD

The record of the Court of Appeals consists of all filed documents as well as the minutes of trial, sentence and the hearing of petitioner's motion for a new trial.

STATEMENT OF FACTS

A. *THE TRIAL*

1. *The Government's Case*

The government's case on the conspiracy count was based chiefly upon the testimony of six co-conspirators. Joseph Ingber, Sheldon Styles, Jenniene Vetrano, Barbara Cupola, Arthur Krieger, and Elliot Martin. This evidence, if credited, showed that Ingber and Styles, both chiropracters, began operating a clinic in Jamaica, Queens, and in 1968, when chiropractic services were included under Medicaid, they began treating Medicaid patients. Ingber and Styles, began submitting false invoices and treatment plans to the New York State Department of Social Services (T22-29).*

Early in 1969, Dr. Kavaler, a former instructor of Ingber and Styles at the Chiropractic Institute of New York and its Acting Dean in the final two years of the school's existence, accepted an offer of Ingber's to work at his office a few days a week (T31-32, 964-65).

As soon as he began to work with Styles and Ingber, he was informed by them of their plan to submit fraudulent treatment plans and invoices to the Medicaid Program (T193-195). Together, the three chiropractors would write chiropractic treatment plans for Medicaid patients who had neither the described condition nor the need for the prescribed treatment. After these plans were approved, false invoices based upon them were sent to Medicaid. (T33-36, 186-187).

Jenniene Vetrano and Barbara Cupola, who performed clerical and receptionist duties in the office, began to write up these treatment plans at the instruction of Dr. Ingber in the summer of 1969. (T46, 195-96, 356-59, 409-11).

*References are to the minutes of trial and are designated "T".

In April, 1969, Dr. Kavaler became an equal partner with Ingber and Styles (T58, 196-97). The following month, the chiropractors opened a second clinic in Corona, Queens (T59). Styles was the original administrator of the Corona clinic, but in June, 1969, they opened another clinic (Galler Medical Center) in Brooklyn, and Styles moved on to administer that clinic. (T64-65). For a short time, Kavaler managed the Corona clinic. While there, he allegedly urged another chiropractor, Dr. Kreiger, working at Corona to bill Medicaid for more patient visits than actually made. Kavaler urged Kreiger to be cautious in doing this and further, to vary the number of visits from invoice to invoice (T-435-36, 438).

In late 1969, after Styles had moved on to open the Queensbridge Clinic (T212-13) Kavaler became the administrator of the Galler Clinic (T212-13). In October, 1970, a podiatrist, Elliot Martin became a staff member at the Galler Clinic. Kavaler allegedly showed him how to carefully falsify treatment records and billings (T491-94, 499-501). Martin adopted these procedures.

In March, 1971, pursuant to a request by Dr. Kavaler the joint ownership of the Galler, Corona, and Queensbridge clinics ended and Kavaler became the sole owner of Galler and terminated his interests in the other clinics (T80-82).

Some months later, the City of New York began an investigation of possible medicaid frauds at these clinics.

At the time of his testimony, Joseph Ingber was awaiting sentence after having pled guilty to a six-count information charging him with conspiracy to defraud the United States, making false claims against the United States, and mail fraud (T. 107-108). In addition, Ingber admitted to destroying records, suborning perjury and perjury, procuring false statements from witnesses and submitting thousands of false invoices (T. 113-114). Sheldon Styles also was awaiting sentence after having pled guilty to the

charges of conspiracy, making false claims, making false statements, mail fraud and income tax evasion. Styles, an unlicensed chiropractor, further admitted to practicing medicine without a license. Arthur Krieger was serving a portion of a sentence of imprisonment imposed upon his plea of guilty to a two-count information charging him with conspiracy and filing false claims. Elliot Martin was serving a sentence of imprisonment imposed upon his plea of guilty to a two-count information charging him with making false statements and filing a false income tax return (T. 521-522). Jenniene Vetrano had perjured herself before a Federal grand jury, later recanted and was told she would not be prosecuted if she thereafter testified for the prosecution (T. 373-374). Barbara Cupola, another clerk-receptionist, testified under a grant of immunity (T. 424).

On the substantive counts, the government offered the testimony of fifteen patients treated at the Galler Clinic and at the Lee Avenue Clinic.* These fifteen witnesses stated, with varying degrees of clarity, that they had received fewer treatments than those listed for them in the invoices sent to Medicaid. (T456-60; 582-86; 593-97; 612-614; 623-30; 640-44; 655-56; 662-64; 648-86; 695-700; 726-28; 735-37; 743-45; 751-53; 759-61)

On cross examination, many of these witnesses were unclear as to other medical visits they made and the nature of any symptoms and treatments. Moreover, these witnesses were testifying about visits made some five years prior to the trial. In several specific instances, it was shown that these witnesses were wrong about their visits to other persons affording them medical or paramedical services.

2. *The Defense Case*

Dr. Kavaler testified in his own behalf. He denied ever discussing false invoices in treatment plans with Ingber or

*The activities at Les Avenue were separate from the alleged conspiracy between Styles, Ingber and Kavaler.

Styles (T991) or authorizing either Vetrano or Cupola to submit false invoices for him (T991). He further testified that he had never "padded" any invoices, nor discussed this practice with Krieger or Martin (T1023, 1142-44). Dr. Kavaler testified that the invoices submitted were accurate and non-fraudulent.

Kavaler insisted that it was his first learning about the illegal activities of Styles and Ingber which caused him, in March, 1971, to sever all connections with them, and further that after that date he had the sole say in the management of the Galler Clinic (T984-5, 1159). Kavaler then introduced two log books which contained his own contemporaneous lists of all patient treatments during the period covered by the indictment. The first book related to the Lee Avenue Clinic (DXAC)* and the second to the Galler Clinic (DXAD).

The Lee Avenue book entries ended in May, 1971 when, as Kavaler testified, he stopped working there (T1104-05).

If these two logs were credited, they would have constituted a complete defense to the substantive charges and would have had a tremendous impact on the conspiracy charge as well.

3. *The Government's Rebuttal*

The government attempted to negate these vital log books by showing that they were recent fabrications. Essential to this effort, was the testimony of Dr. Hamid Alizadeh, the administrator of Lee Avenue and Gloria Silva, Alizadeh's secretary, to the effect that Dr. Kavaler worked at Lee Avenue long after May, 1971.

Dr. Alizadeh's testimony was that he had received rent checks from Kavaler through 1973 (T1257-58). On cross-examination, Dr. Alizadeh admitted that he had no actual

*References are to defendant's exhibits at trial, both of these Exhibits are set out in petitioner's appendix at 8a and 31a respectively.

recollection of Kavaler working at the clinic after 1971 and that payment of rent did not mean that Kavaler had worked there after 1971. (T1260-62).

Far more damaging to Kavaler's case was the testimony of Mrs. Silva. On her direct examination by the prosecutor, the following colloquy occurred:

> Q. When do you recall was the last year you saw him?
>
> A. The last time I saw him?
>
> THE COURT: *The last time you saw him treating patients is what the question was.*
>
> A. I'm not too sure, '73, '72.
>
> Q. *'72 or '73?*
>
> A. *Yes.*
>
> Q. The last payment you saw was January of '74, do you remember him treating patients then?
>
> A. Could be. (T1281) (emphasis added)

On cross-examination, Gloria Silva testified as follows:

> Q. You said could be, are you positive under oath that you saw him in 1973?
>
> A. Yes, I did.
>
> Q. And in '72?
>
> A. '72 possibly.
>
> Q. And '71?
>
> A. '71, I did.
>
> Q. You saw him in '71. (T1283)

In its summation, the government stressed the supposed falsity of Kavaler's claim that he stopped working at Lee Avenue in May, 1971 as a prime basis for finding that the log book was a recent fabrication.

> What do we have? We have a book which has patients which begin on February 10, 1971, and end on May 27, 1971. The counts begin March 31, 1971, and end on May 7, 1971. Dr. Kavaler testified when he was asked why was this so short

> that well, he didn't work at Lee Avenue after May of 1971.
>
> *You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973,* and Mr. Esbitt has suggested to you, and will doubtless continue to suggest, that Dr. Kavaler was making rent payments for other people because he had these relationships with them where they were working for him really.
>
> Also in evidence are the rent pages from these other doctors and you may inspect them and compare the dates and you may find from looking at these that they all made their own rent payments and *the rent payments on Dr. Kavaler's sheet are Dr. Kavaler's rent payments because he worked there until late 1973.* There is evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month — less than a month — after the last substantive count in the indictment. (T1341-42) (emphasis added).

Kavaler's Motion for a New Trial

On September 13, 1976, trial counsel filed a motion for a new trial in the District Court. Judge Brieant conducted a hearing on the motion on September 17, 1976 at which Gloria Silva, Dr. Alizadeh and George Wilson testified.

At the hearing, Mrs. Silva testified that after her appearance on July 27, 1976, she returned to her office with Dr. Alizadeh. During the cab ride back to her office she mentioned to Dr. Alizadeh that she thought she had made a mistake in her testimony concerning the years during which she had seen Dr. Kavaler working at the clinic. The next morning, July 28, 1976, she called her own attorney

who told her that if she felt she had made a mistake, she should return and see the judge. (H. 13-15)*

That same morning, she returned to Court with Dr. Alizadeh. In the courthouse lobby, they met Agent Hartwig, who had driven them to Court on the 27th, and explained the situation. Agent Hartwig brought them upstairs to the witness room (H.16-18). When Mr. Wilson, the Assistant United States Attorney trying the case found them, Mrs. Silva told him that she had made a mistake and that Dr. Kavaler did not work at Lee Avenue in 1972 or 1973 (H.18-19). She indicated that she wanted to see the judge and to change her testimony (H.67). Mr. Wilson told her that she had not testified that Dr. Kavaler had worked at Lee Avenue during those years, but only that she had seen him there during that period (H.19). Mr. Wilson then showed her the transcript of her cross-examination by defense counsel which reflected that she was asked only if she had seen Dr. Kavaler at Lee Avenue (H.32). Convinced that her recollection of what she had been asked was incorrect and that she had not testified that Dr. Kavaler worked at Lee Avenue, Mrs. Silva left without seeing the judge or changing her testimony (H.19-20).

When Mr. Wilson took the witness stand at the post-trial hearing, he testified that he had met with Ms. Silva and Dr. Alizadeh after his summation, but before the summation of Mr. Esbitt, who was trial counsel for the defendant (H.66). Mr. Wilson stated that while he was certain he had shown Mrs. Silva the transcript of her cross-examination, he could not recall whether he had shown her the transcript of her entire trial testimony (H.75-76). However, a memorandum, dated July 29th, prepared by Mr. Wilson, states, in pertinent part:

*References are to the minutes of the hearing on the motion for a new trial and are designated "H".

> Mrs. Silva had reported that she thought she had testified falsely by saying that she saw Kavaler work at the Lee Avenue clinic in 1972 and 1973. *I showed her her testimony on cross by Esbitt* (which only dealt with whether she had seen Kavaler during this period). Mrs. Silva, after reading her testimony appeared to be relieved that she had not testified falsely. . . . . (emphasis added) (37a)

Furthermore, the affidavit of John Hartwig, the Government investigator who witnessed this entire episode states:

> Mr. Wilson showed her Mr. Esbitt's cross examination in the transcript. (38a)

At no point, did the prosecutor inform defense counsel, trial judge or the jury that Mrs. Silva had returned to the courthouse and had asked to see the trial judge or had expressed a desire to correct her trial testimony with respect to when Dr. Kavaler had worked at the Lee Avenue clinic.

At the end of the hearing, the motion was denied and the decision of the Court read into the record.

REASONS FOR GRANTING WRIT

THE DECISION BELOW RAISES SERIOUS AND IMPORTANT QUESTIONS CONCERNING THE OBLIGATION OF THE PROSECUTION TO CORRECT FALSE TESTIMONY OR ANY FALSE IMPRESSIONS GIVEN THE TRIER OF FACT BY EVIDENCE PRESENTED BY THE GOVERNMENT AND THE EFFECT OF THE FAILURE TO CORRECT SUCH FALSE EVIDENCE OR IMPRESSIONS ON THE FAIRNESS OF THE TRIAL.

During the trial, Dr. Kavaler offered into evidence two log books containing entries of patient treatments made at the Lee Avenue and Galler Clinics. If believed, these books would have constituted a complete defense to the substantive charges and would have greatly effected the conspiracy charge as well.

As to the Lee Avenue book, Dr. Kavaler testified that the entries ended in May, 1971, because that is when he stopped working at Lee Avenue. Recognizing the significance of these log books, the government mounted an assault upon them, the lynch-pin of which was an attack on Dr. Kavaler's testimony that he stopped work at Lee Avenue in May, 1971.

To establish the falsity of Kavaler's testimony, the government called Dr. Alizadeh and Mrs. Silva solely to establish that Kavaler had worked at Lee Avenue long after he said he had left. Of the two witnesses, it was Mrs. Silva whose testimony was truly damaging.*

*On cross-examination Dr. Alizadeh conceded that he had no personal knowledge of when Dr. Kavaler left Lee Avenue and that the rent checks recorded after May did not necessarily mean Kavaler worked there after May.

On direct examination, Mrs. Silva was asked by the Court:

> The last time you saw him treating patients is what the question was.
>
> A. I'm not too sure, '73, 72.
>
> Q. 72 or 73?
>
> A. Yes. (T. 1281).

On cross examination she was asked when she had last seen Kavaler at Lee Avenue and she answered that she had seen him in 1972 and 1973 (T. 1283).

There can be no doubt that the clear import of Mrs. Silva's testimony was that Dr. Kavaler worked at Lee Avenue long after May, 1971* and that Dr. Kavaler had lied in his testimony.

In its summation-in-chief, the prosecutor stressed the testimony of Mrs. Silva as:

> . . . evidence of Dr. Kavaler's attempt to falsely explain why this record ends just a month—less than a month—after the last substantive count in the indictment (T1342).

Accordingly, the defense was forced to meet this attack in its summation (T1386-89).

But the impression created by Mrs. Silva's testimony was false and the prosecution knew or should have known it was false at a time when corrective measure could have and should have been taken.

The day after her testimony, Mrs. Silva realized that at some point she had given incorrect testimony about the dates of Dr. Kavaler's employment. She called her own attorney, who suggested she go back to the trial judge and inform him of her fears.

*Mrs. Silva was called as a witness for just this purpose.

The next day she and Dr. Alizadeh did just that. Unfortunately, she never got to see the judge, but rather spoke only to the prosecutor. This conversation, according to the prosecutor, took place after the government's summation-in-chief, but before the defense summation, and obviously, before the government's rebuttal summation.*

Mrs. Silva informed Mr. Wilson of her fears, but Mr. Wilson allayed those fears by showing her her testimony on cross-examination which dealt only with when she *saw* Dr. Kavaler. But, Mrs. Silva made it very clear that Dr. Kavaler had not worked at Lee Avenue after May, 1971, (H18-19, 24-26, 32, 41).

At no point did the prosecution inform the Court, defense counsel, or the jury of what had occurred between Mr. Wilson and Mrs. Silva.

The following facts emerge from the record:

First, government counsel knew before the case went to the jury, that Mrs. Silva had unequivocally denied that the defendant had unequivocally denied that the defendant had worked at the Lee Avenue clinic during 1972 and 1973.

Second, government counsel chose to withhold this evidence from defense counsel and the trial court.

Third, government counsel, in the face of the witness' unequivocal denial, did not bring to the jury's attention that a material part of her testimony on direct examination was untrue.

Fourth, government counsel, even assuming that his meeting with Mrs. Silva and Dr. Alizadeh occurred after his summation,**chose not to correct his closing remarks to

*Pursuant to Rule 29.1 F.R.Cr.P. (eff. December 1,1975). Mr. Wilson must have been aware of his right to rebut since he referred to it in his summation in chief (T 1314-15).

**The record suggests that the meeting between Mrs. Silva and Mr. Wilson may have occurred before Mr. Wilson's summation. On the morning of July 28th when Dr. Alizadeh and Mrs. Silva met with Mr. Wilson, they signed in at the courthouse at 9:30 A.M. (H. 54) The proceedings in court that morning did not commence until 10:10 A.M. (T. 1309), which would have provided ample time for the meeting with Mr. Wilson prior to his summation which began minutes later. After his summation, the trial judge declared a ten minute recess at the conclusion of which defense counsel began his closing argument to the jury (T. 1351). The rather short interval between the two summations, we suggest, was too brief for the meeting between the witness and the prosecutor to have occurred at that point.

the jury that: "You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva . . . and it was their best recollection that he [the defendant] worked there as late as December 1973. . . ." (T. 1341)

Fifth, as stated by the prosecutor in his summation, Kavaler's patient records were the "very key to Kavaler's defense" (T. 1340).

Even if Mrs. Silva's testimony was literally correct, (it is Kavaler's position that the testimony was not correct in any sense, since on *direct* examination she was asked if she had seen Kavaler *working* at Lee Avenue) the prosecutor used this testimony to support an inference which was false. Whether this falsity became apparent to Mr. Wilson before his summation-in-chief or immediately after, Mr. Wilson was in a position to inform the defense before its summation so that it could request that the case be reopened, or Mr. Wilson, pursuant to Rule 29.1 F.R.Cr.P. (eff. December 1, 1975), could have corrected the false inference during his rebuttal summation. Instead, he chose to do nothing.

No matter what surgery is performed on Mrs. Silva's trial testimony and her testimony at the post-trial hearing on the motion for a new trial, it is clear, that the government used Mrs. Silva's testimony to prove something which she herself believed false. Moreover, the government was aware of this at a time when appropriate corrective measures were available. The actions of the prosecutor were highly improper and present a most serious issue.

It is not contended that Mrs. Silva's testimony at trial was perjurious. At the moment she testified she honestly, but mistakenly, believed her testimony was correct. While not perjurious, her testimony was false. See *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967).

> [A] conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment. . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. (citations omitted)

Napue v. Illinois, 360 U.S. 264 (1959).

The prosecutor's duty to disclose false testimony by one of its witnesses is not limited to those instances where the witness intentionally commits perjury, but encompasses the situation in this case where the prosecutor learns that the witness' testimony, although given in good faith, is untrue. This broad duty was aptly expressed by the Court of Appeals for the Third Circuit in *United States v. Harris*, 498 F.2d 1164, 1169 (3rd Cir.), *cert. denied* as *Young v. United States*, 419 U.S. 1069 (1974). At a minimum, the prosecutor was required to seek advice from the court in order to resolve the problem which he chose not to do. *Cf. United States v. Deutsch*, 373 F. Supp. 289, 291-92 (S.D.N.Y. 1974); *United States v. Gleason*, 265 F. Supp. 880, 885, *et seq.* (S.D.N.Y. 1967).

The prosecutor, as well as the court, has the duty to insure that the accused enjoys his right to a fair trial safeguarded by the due process clause of the Fifth Amendment. Government counsel "has the responsibility and duty to correct what he knows to be false and elicit the truth. . . ." *Napue v. Illinois, supra*, 360 U.S. at 270 quoting *People v. Savvides*, 1 N.Y. 2d 554, 557, 154 N.Y.S.

2d 885, 887, 136 N.E. 2d 853, 854-55 (1956).* In the present case, the prosecutor breached that duty by failing to inform the jury of the truth when it became known to him. Nor did he even advise defense counsel or the trial judge of this information. Compare *United States v. Harris, supra*. Furthermore, the wrong committed by the prosecutor in failing to correct Mrs. Silva's misstatements, was compounded by failing to correct his own argument to the jury based on those statements.

A conviction obtained through the use of testimony known by the Government to be untrue must be vacated if

> . . . the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . [or if] the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." *Napue v. Illinois, supra*, 360 U.S. at 271-272; *United States v. Giglio*, 405 U.S. 150, 154 (1972). *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 267 (2nd Cir. 1975), *cert. denied*, 96 S. Ct. 1147 (1976).

Moreover, though this issue arose in the context of a motion for a new trial based on newly discovered evidence, here:

> However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can be shown that the government deliberately suppressed the evidence, a

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*See also, ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, §5.6:

> (a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or *fail to seek withdrawal thereof upon discovery of its falsity*. (emphasis added)

new trial is warranted if the evidence is merely material or favorable to the defense. *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

United States v. Kahn, 472 F.2d 272, 287, *cert. denied*, 411 U.S. 982 (1973).

The importance of Mrs. Silva's testimony to the Government's case is clear. If the jury credited her testimony, as we must assume it did, it must have concluded that the Kavaler lied on the witness stand. The issue created by her misstatements went directly to the heart of Dr. Kavaler's defense, his credibility and the credibility of his exhibits.*

In addition, if the government could prove the Lee Avenue diary was a recent fabrication, then the jury could easily have rejected as well the Galler Clinic diary. This is precisely what the government argued in its summation (T 1340-44).

Finally, it must be remembered that the jury deliberated from 3:30 p.m. to 5:00p.m. on July 28th; 10:30 a.m. to 2:45 p.m. on the 29th, when they sent out a note indicating they were deadlocked at 11 to 1 (T1489-1490); and from 2:45 p.m. until 6:45 p.m. (T1491), when they reached a

*The District Court instructed the jury that:

If any witness is shown to have knowingly testified falsely concerning any material matter in a trial, you have a right to distrust such witness' testimony in other particulars and you may reject all of the testimony of that witness or give such parts of it such credence as you think it deserves. An act or omission such as testifying falsely is knowingly done if it was done voluntarily and intentionally and not because of a mistake or accident or some other innocent reason. (T1430)

verdict. The length of deliberations and the note clearly indicated that the jury was having difficulty in reaching a verdict and further, that this was a hotly contested case. Given the nature of the government's actions; the nature of the evidence withheld from the defense, the Court, and the jury; and the length of the deliberations, it is clear that Kavaler was denied a fair trial.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT BELOW REVERSED.

Respectfully submitted,

NANCY ROSNER

J. JEFFREY WEISENFELD,
on the petition

APPENDIX A—OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of January one thousand nine hundred and seventy-seven.

Present:

HONORABLE J. EDWARD LUMBARD
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

-against-

MAX KAVALER,
Defendant-Appellant.

76-1475

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Max Kavaler appeals from his conviction for conspiring to commit, and committing, Medicaid fraud, 18 U.S.C. §§287, 371, and

from an order of Judge Brieant denying a new trial. Undoubtedly because the evidence against him was overwhelming, appellant does not attack its sufficiency. He claims only that the grand jury was misled as to the nature of the evidence against him and that he was deprived of a fair trial by the prosecutor's failure to correct a witness's allegedly false statement. Neither contention has merit. The prosecutor did not present misleading evidence to the grand jury, but in fact informed it of the hearsay nature of the evidence and told it that it could question the hearsay declarants directly if it wished. As to the testimony of Mrs. Silva, there is no reasonable likelihood that the corrected version of her testimony would have altered the outcome of the trial in view of the overwhelming evidence against Kavaler, and Judge Brieant did not abuse his discretion in denying the motion for a new trial. We therefore affirm the judgment of conviction and the order denying a new trial.

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ Wilfred Feinberg
WILFRED FEINBERG

s/ William H. Mulligan
WILLIAM H. MULLIGAN

Circuit Judges

APPENDIX B—DECISION OF THE DISTRICT COURT ON KAVALER'S MOTION FOR A NEW TRIAL

Mrs. Silva was my cross-examination and on the basis of that he convinced her there is nothing to see the judge about, but she did want to see the judge and she should have seen the judge, and your Honor should have made the decision and not Mr. Wilson as to whether or not there was a sufficient basis for resubmission to the jury.

THE COURT: At this time I will now make my findings and conclusions on this motion.

I will begin by saying that the motion, of course, is addressed to the discretion of the Court and has to be considered on the basis of the entire trial record, including the charges, the proof, the rest of the proof in the case, and all of the relevant facts, and ordinarily would not be granted in the absence of governmental misconduct unless it was found that the new evidence rose to a sufficient level which would probably produce a different verdict in the event of a retrial.

That is the touchstone upon which this motion must be approached and merely cumulative or collateral matters, particularly if they could have been discovered with due diligence prior to trial, will not ordinarily constitute sufficient new evidence to grant a new trial.

I think it is proper to cut through any argument on the issue and treat the matter just as if this information had come to the Court after the proof was closed and after the government had made its summation but prior to the defendant's summation while the jury, of course, had not yet received the case.

Perhaps the standards for reopening a trial which has been closed and proceeded halfway through summations is less severe but I really think that if the lady and Dr. Alizadeh had come in to see me, as hindsight tells us we all

wish they had, I doubt very much I would have reopened the trial record even then based on her testimony before me at the hearing which I held on September 17.

Now, I would say from my observation of Mrs. Silva and hearing her and observing her demeanor that she is an honest witness, a well-educated person. She is a very capable person, a conscientious person who has a substantial job and who supervises the work of others in a difficult area of employment, and there is nothing about her which is lacking in judgment or discretion or willpower. And I would say also that understandably she is very favorably inclined toward the defendant, holds him in very high regard.

The same is true of Dr. Alizadeh.

The proof before me on the hearing shows clearly to me that Mrs. Silva testified truthfully on September 17, she testified truthfully on the trial. She gave her best recollection as to a somewhat peripheral matter as to whether he actually worked, he being the defendant, in the Lee Avenue Clinic during 1972 or 1973 or in 1974, January, and her answer was very clear on the trial.

She said, "I'm not too sure." And she said, "Could be."

Her answers on cross-examination were truthful and it was relevant whether she saw him, as I mentioned earlier, it was just as much relevant from the defendant's point of view whether he had worked there or not.

The question of when he had worked at Lee Avenue became important in the trial only because of the suspicion which the government held and which it argued to the jury and which the Court believes might almost be inferred from a physical examination of Defendant's Exhibit AC and of a companion exhibit in the case, although I wouldn't go so far as to say it is clearly so beyond a reasonable doubt, but the government was arguing, not without reason, that these two books, because they conflicted with testimony of the

patients and because they only covered a limited period of time and because of their relative physical newness and the similarity of the ink and the handwriting from day to day, were a recent fabrication.

They also made the point they had not been produced pursuant to prior state and federal subpoenas and that they were therefore a recent fabrication.

That is the only relevancy of the testimony of Mrs. Silva on the trial. It was purely cumulative.

The most Mrs. Silva told the jury was that it "could be." That is the sum and substance of her testimony. She testified truthfully as to her then recollection. After she left the trial and after she began to think it over, she came to believe that perhaps her testimony was wrong and that she should have answered that he did not work there.

Besides the peripheral nature of this issue, this is not a case where false testimony was given or where the government sponsored and relied upon a perjurious witness; simply that her recollection was vague.

She told the jury her recollection was vague. She told the jury the truth and then a day or two later her recollection became more firm and more clear after she pondered on the matter some more.

Neither the jury nor this Court should read into a question what is not there, and questions have to be taken on their face value, and the entire testimony of Mrs. Silva at the trial has to be taken on its face value.

I would say for the record that besides Mrs. Silva, and besides Dr. Alizadeh and the defendant himself, there are probably one hundred people available who could testify to the objective fact as to whether Dr. Kavaler ever treated patients at the Lee Avenue Clinic. So this was not an issue of fact which, if it had any importance, could not be traversed by others, and all that information was available from many other sources.

The government was leaning on very slender proof in the direct or cross-examination of Mrs. Silva to the contrary.

I am prepared to find that this testimony is purely peripheral and would not alter the outcome of the trial which, basically, depends on whether the patitents who testified here were treated the number of times and on the dates that the billings signed by the defendant say that those patients were treated.

The proof was overwhelming that there were charges made for patients' treatments which were not given to the patients at the times and dates and locations specified by this defendant. That is what the jury found.

There is more than ample evidence here to find it.

Had the trial been reopened and Mrs. Silva said he was not working in Lee Avenue during those dates, the issue pertaining to Exhibit AC for identification would not have been materially altered and the real underlying issue of the trial would not be either.

Now, I really believe had she come in to see me I would not have reopened the trial record then. I see no reason for granting the motion now.

Of course, tested by hindsight, it would have been much better and certainly in accordance with our tradition had the prosecutor told defense counsel that Dr. Alizadeh and Mrs. Silva had come back to try to change her testimony. It is too late for that now. The government did not prevent her from seeing the Court. Both she and Dr. Alizadeh are intelligent people and self-willed and have strength of mind and could have and would have insisted on seeing the Court.

I am not prepared to find for certain what pages she actually read in the witness room of the trial record. However, I do find that she expressed her concern not over anything that she had said on direct testimony but she

expressed her concern over the possible correctness of her cross-examination testimony.

The United States Attorney was acting properly when he responded to the concern which she and Dr. Alizadeh expressed. So that if he showed her only the cross-examination, that was not improper, and I do not find that that was done with any intention to mislead or to overhear her or divert her from her desire to see the Court.

I find that she testified truthfully at the trial. A trial has to end some time and the fact that later on a witness has a different view of what his or her recollection is, particularly in such a vague and peripheral item as this, is simply not sufficient ground for this Court to set aside this verdict.

I refuse to find that the government prevented her or wrongfully induced her not to come in and see the Court.

I think the United States Attorney attempted to deal directly with the issue she raised fairly, and apparently the two of them left satisfied that she had not testified falsely and she told me on September 17, at page 25 of the hearing record, that she thought he was working there at the time when she was testifying, and that's all any witness ever testifies to in a trial, his or her best recollection.

The fact that she later remembers differently is, as I believe I have said earlier, insufficient both in fact and law, and in the totality of the circumstances present here.

So, for those reasons, the Court concludes that the motion for a new trial be and hereby is denied.

The foregoing constitutes my findings of fact and conclusions of law on this hearing.

I will now set a date for you all to come back.

How about the 29th, General Esbitt? Is that all right with you? 9:30 in the morning?

MR. ESBITT: For sentence, your Honor?

THE COURT: Yes.

I am not prepared to impose sentence at this time. I have intentionally not gone into the question of the letters and the probation report. I didn't want to get those things in mind while I had this other matter open.

MR. ESBITT: I appreciate that. That date is satisfactory.

THE COURT: Is that satisfactory to you, Mr. Wilson?

MR. WILSON: I am on trial before Judge Wyatt next week.

THE COURT: He doesn't start until ten, does he?

MR. WILSON: I have forgotten.

THE COURT: Ask him if he won't let you come here.

MR. WILSON: Perhaps I can ask to start a half hour later that morning.

MR. ESBITT: This room, your Honor?

THE COURT: Yes, this room.

Dr. Kavaler, you are continued on your existing bail arrangements until then.

The Court will be in recess.

DEFENDANT'S EXHIBIT AC AT TRIAL (THE GALLER CLINIC LOGBOOK)

February 9 Tuesday

Wednesday February 10

Ortiz, Theresa
Ortiz, Reinaldo
Gutierrez, Anna
Cruz, Basilio
Soto, Emma
Matias, Celinida

February 15 Monday

Rivera, Cathy
Ortiz, Reinaldo
Santos America
Gutierrez, Anna
Ortiz, Theresa
Soto, Emma
Cruz, Basilio
Matias, Celinida
Graves, Dorca
Albert, Dora
Einhorn, Sheila
Colon, Maria
Rodriguez, Minerva
Szurdinsky, Richard
Arroyo, Joshua

Tuesday 16 February

February 17 Wednesday

Gutierrez, Anna
Ortiz, Reinaldo
Ortiz, Theresa
Soto, Emma
Graves, Dorea
Matias, Celinida
Roman, Leonidas
Szuminsky, Richard
Espinosa, Rachel
Barreto, Evarista
Echevarria, Rosa
Pringle, Mary

Thursday 18 February

Santos, America
Cruz, Basilio
Albert, Dora
Einhorn, Sheila
Rivera, Cathy
Colon, Maria
Rodriguez, Minerva
Szurvinsky, Richard
Arroyo, Joshua
Ruzi, John

February 19 Friday

Santos, America

Saturday 20 February

February 21 Sunday

Monday 22 February

Matias, Celinida
Ortiz, Reinaldi
Soto, Emma
Barreto, Evarista
Szuminsky, Richard
Espinosa, Rachel
Arroyo, Jasimia
Colon, Maria,
Ortiz, Theresa
Rodriguez, Minerva
Cruz, Basilio
Rodriguez, Evarista
Ruiz, John
Echevarria, Rosa
Melero, Emily
Rivera, Cathy

February 23 Tuesday

Wednesday 24 February

Szuminsky, Richard
Soto, Emma
Einhorn, Sheila
Arroyo, Josmin
Rodriguez, Evarista
Gutierrez, Anna
Albert, Dora
Matias, Celinida
Rivera, Cathy
Torres, Provedenaia
Espinosa, Rachel
Graves, Dorca
Gonzalez, Dionisio
Pringle, Mary
Cruz, Basilio
Ortiz, Theresa

February 25 Thursday

Quinones, Luz
Torres, Providencia
Ruiz, John
Echevarries, Rosa
Matias, Celinida
Melero, Emily
Colon, Maria
Ortiz, Reinaldo
Ortiz, Theresa
Rodriguez, Minerva
Cruz, Basilio
Cruz, Petra
Valentin, Librada
Rodriguez, Yolonda
Barreto, Evarista

Friday 26 February

March 1 Monday

Soto. Emma
Matias Celinda
Torres. Providencia
Gutierrez. Anna
Colon. Maria
Albert. Dora
Cruz. Petra
Melero. Emily
Pringle. Mary
Rodriguez. Maria
Echevarria. Rosa
Arroyo. Jasmin
Einhorn. Sheila
Espinosa. Rachel
Rodriguez. Minerva
Ruiz. John
Gonzalez. Dionisio
Valentin. Librada
Rodriguez. Yolanda
Rodriguez. Evarista
Quinones. Luz
Velez. Carmen
Cruz. Basilio
Ortiz. Theresa
Ortiz. Reinaldo

Tuesday 2 March

March 3 Wednesday

Colon. Maria
Rivera. Cathy
Cruz. Basilio
Rodriguez. Maria

Szuminsky. Richard
Ortiz. Reinaldo
Quinones. Luz
Johnson. Florean
Mendezo. Juanita
Ruiz. John

Thursday 4 March

Cruz. Petra
Arroyo. Jasmin
Albert. Dora
Matias. Celinida
Melero. Emily
Soto. Emma
Echevarria. Rosa
Einhorn. Sheila
Valentin. Librada
Rodriguez. Yolanda
Espinosa. Rachel
Palmer. Bernice
Garcia. Irma
Velez. Carmen
Torres. Ada

March 7 Sunday

Monday 8 March

Colon. Maria Gutieerez. Anna
Espinosa. Rachel
Melero. Emily
Arroyo. Jasmin
Eschevarria. Rosa
Matias. Celinida
Albert. Dora
Cruz. Basilio
Johson. Florean

Ortiz. Reinaldo
Palmer. Bernice
Gonzalez. Dionisio
Ortiz. Theresa
Quinones. Luz
Rodriguez. Minerva
Pringle. Mary
Rivera. Cathy
Soto. Emma
Valentin. Librada
Garcia. Irma
Molina. Irma
Riversa. Merceees
Figueroa. Carmen
Hernandez. Carmen
Einhorn. Sheila

March 9 Tuesday

Wednesday 10 March

Rodriguez. Maria
Szuminsky. Richard
Velez. Carmen
Johnson. Florean
Ruiz. John
Einhorn. Sheila
Rodriguez. Yolanda
Tores. Ada
Mendez. Juanita
Figueroa. Carmen
Molina. Irma
Soto. Emma
Rodriguez. Minerva
Gutierrez. Anna
Barreto. Julia

March 11 Thursday

Matias. Celendina
Arroyo. Jasmin
Echevarria. Rosa
Melero. Emily
Garcia. Irma
Quinnones Luz
Colon. Maria
Palmer. Bernice
Albert. Dora
Hernandez. Carmen
Cruz. Basilio
Burgos. Awilda
Espinosa. Rachel
Riversa. Cathy
Pringle. Mary
Valentin. Librada
Rivera. Mercedes
Ortiz. Reinaldo

Friday 12 March

March 15 Monday

Velez. Carmen
Rivera. Mercedes
Albert. Dord
Arroyo. Jasmin
Mendez. Juanita
Hernandez. Carmen
Colon. Maria
Figueroa. Carmen
Barreto. Julia
Barreto. Evarista
Torres. Ada
Cruz. Basilio
Eschevarria. Rosa

Palmer, Bernice
Molina, Jama
Garcia, Irma
Matias, Celinida
Metero, Emily
Szuminsky, Richard
Ortiz, Reinaldo
Ortiz, Theresa
Rivera, Cathy
Soto, Emma
Ruiz, John
Rodriguez, Minerva
Valentin, Librada
Rodriguez, Yolanda
Einhyorn, sheila

Tuesday 16 March

March 17 Wednesday

Einhorn, Sheila
Rodriguez, Minerva
Colon, Maria
Espinosa, Rachel
Garcia, Irma
Gutierrez, Anna
Pringle, Mary
Szuminsky, Richard
Ruiz, John
Quinones, Luz
Velez, Carmen

Thursday 18 March

Cruz, Basilio
Figueroa, Carmen
Mendez, Juanita
Albert, Dora

Ortiz, Reinaldo
Rodriguez, Yolanda
Torres, Ada
Rivera, Cathy
Arroyo, Jasmin
Palmer, Bernice
Soto, Emma
Echevarria , Rosa
Velentin, Librada
Cruz, Yolanda
Mattias, Celendina
Melero, Emily
Molina, Irma
Barreto, Julia

March 21 Sunday

Monday 22 March

Mendez, Juanita
Figueroa, Carmen
Einhorn, Sheila
Matias, Celinida
Ruiz, John
Echevarria, Rosa
Hernandex, Virginia
Arroyo, Jasmin
Cruz, Yolanda
Melero, Emily
Rodriguez, Minerva
Garcia, Irma
Soto, Emma
DeJesus, Gloria
Molina, Irma
Hernandez, Carmen
Albert, Dora
Palmer, Bernice
Velez, Carmen

Pringle. Mary
Quinones. Luz
Valentin. Librada
Torres. Ada
Rodriguez. Yolanda
Antron. Zoraida

March 23 Tuesday

Wednesday 24 March

Andujar. Epifania
Szuminsky. Richard
Soto. Emma
Arroyo. Jasmin
Palmer. Bernice
Valentin. Librada

March 25 Thursday

Echevarria. Rosa
Melero. Emily
Gordils. Lillian
Irizarry. Carmen
Albert. Dora
Andujao. Epifarria
Rodriguez. Minerva
DeJesus. Gloria
Zambrano. Teodoro
Ramos. Maria
Creque. Lucilda
Creque. Romelia
Garcia. Irma
Figueroa. Carmen
Mendez. Juanita
Monina. Irma.
Velez. Carmen
Torres. Ada

Quinones. Luz
Rodriguez. Yolanda
Pringle. Mary
Serrano. Georgina
Cintron. Zoraides
Cruz. Lucia
DeJesus. Elsie

Friday 26 March

March 29 Monday

Melero. Emily
Soto. Emma
DeJesus. Gloria
Ramos. Maria
Albert. Dora
Serrano. Georgian
Colon. Emilia.
Mendez. Juanita
Arroyo. Jasmin
Echevarria
Valentine. Librada
Hernandez. Virginia
Torres. Ada
DeJesus. Emily
Matias. Celinida
Rodriguez. Yolanda
Zarilrano. Teodoro
Quinones. Luz
Creque Lucilda
Ruiz. Elisa
Gordils. Lillian
Creque. Romelia
Cruz. Yolanda
Garcia. Isma
Velez. Carmen
Palmer. Bernice

Tuesday 30 March

March 31 Wednesday

Soto, Emma
Edrevarria, Rosa

Thursday 1 April

Ruiz, Elisa
DeJesus, Elsie
Irizarry, Carmen
Creque, Lucilda
Cruz, Lucia
Vega, Nilda
Vega, Nereida
Serrano, Georgina
Colon, Emilia
Johnson, Paula
Garcia, Irma
Mendez, Juanita
Torres, Aida
Molina, Irma

April 4 Sunday

Monday 5 April

Creque, Lucilda
Serrano, Georgina
Colon, Emilia
Johnson, Paula
Cruz, Lucia
Ruiz, Elisa
DeJesus, Elsie
Creque, Romelia
Irizarry, Carmen
Gerena-Gomez, Gregorima
Ramos, Maria

Torres, Ada
Velez, Carmen
Palmer, Bernice

April 8 Thursday

DeJesus, Elsie
Irizarry, Carmen
Creque, W.
Arroyo, Wilfredo
Ortiz, Carmen
Creque, Lucilda
Cruz, Lucia
Garcia, Irma
Mendez, Juanita
Molina, Irma
Rodriguez, Maria
Brito, Esther
DeJesus, Gloria
Rojas, Francisca
Garcia, Glddys
Velez, Carmen
Serrano, Georgian
Ruiz, Elisa

Friday 9 April

April 12 Monday

Mendez, Juanita
Colon, Emilia
Ruiz, Elisa
Creque, Lucilda
Huertas, Delia
DeJesus, Elsie
Cruz, Lucia
Gerena, Carmen
Ortiz, Carmen

Irizarry . Carmen
DeJesus. Gloria
Ramos. Maria
Rojas. Francisca
Garcia. Gladys
Orta. Annie
Green. Aida
Gomez. Jose
Garcia. Irma
Torres. Ada
Molina. Irma
Palmer. Bernice
Serrano. Georgina
Arroyo. Wilfredo
Santiago. Carmen

Tuesday 13 April

April 14 Wednesday

Thursday 15 April

Green. Aida
Colon. Emilia
Creque. Lucilda
DeJesus. Gloria
Brito. Esther
Rojas. Francisca
Garcia. Gladys
Arroyo. Doris
Gonzalez. Margarita
Santiago. Justino
Perez. Eneida
Rivera. Axa
Alvarado. Martha
Gomez. Jose
Cruz. Lucia
Garcia. Irma

Ramos. Maria
Torres. Ada
Velez. Carmen
Ortiz. Carmen
Molina. Irma
Irizarry. Carmen
Gerena. Gomez. G.
Ruiz. Elisa
Serrano. Georgian
Huertas. Delia
Cruz. Angelina

April 18 Sunday

Monday 19 April

Medina. Ruth
Arroyo. Doris
Perez. Emeida
Gonzalez. Margarita
Orta. Annie
Santiago. Justino
Rivera. Axa
Alvarado. Martha
Santiago. Carmen
Green. Aida
Gomez. Jose
Rodriguez. Maria
Huertas. Delia
Colon. Emilia
Creque. Lucilda
Garcia. Gladys
DeJesus. Elsie
Cruz. Lucia
Garcia. Irma
DeJesus. Gloria
Ramos. Maria
Ortiz. Carmen

Torres, Ada
Molina, Irma
Mendez, Juanita
Ruiz, Elisa

April 22 Thursday

DeJesus, Gloria
Orta, Annie
Gonzalez, Margarita
Medina, Ruth
Alvarado, Martha
Rivera, Aixa
Arroyo, Doris
Santiago, Justino
Brito, Esthr
Santiago, Carmen
Colon, Emilia
Creque, Lucilda
Creene, Romelia
DeJesus, Elsie
Cruz, Lucia
Garcia, Gladys
Ramos, Maria
Molina, Irma
Irizarry, Carmen
Gerena-Gomez, G.
Mendez, Juanita
Rojas, Francisca
Ruiz, Elisa
Serrano, Georgina
Gomez, Jose
Ruiz, Carmen
Cruz, Angelina
Rivera, Alice

Friday 23 April

Cortes, Milagros

April 26 Monday

Arroyo, Doris
Molina, Irma
Gerana-Gomez
Colon, Emilia
Garcia, Gladys
DeJesus, Elie
Alvarado, Martha
Creque, Lucilde
Irizarry, Carmen
Brito, Esther
Orta, Arnie
Gomez, Jose
Cruz, Lucia
Ortiz, Carmen
DeJesus, Gloria
Perez, Eneida
Green, Aida
Rivera, Aida
Gonzalez, Margarita
Ramos, Maria
Ruiz, Elsa
Santiago, Justino
Rodriguez, Maria
Huertas, Delia
Cortes, Milagros
Rojas, Francisca
Gerrano, Georgina
Cruz, Angelina
Rivera, Alice

Tuesday 27 April

April 28 Wednesday

Thursday 29 April

Colon, Emilia
Gerena-Gomez, Gregoria

Irizarry, Carmen
Cruz, Lucia
Arroyo, Doris
DeJesus, Gloria
Orta, Annie
Rodriguez, Maria
Alvarado, Martha
Creque, Lucilda
Perez, Eneida
Santiago, Justino
Rojas, Francisca
Cruz, Angelina
Ramos, Maria
Green, Aida
Brito, Esther
Garcia, Gladys
Ortiz, Carmen
Serrano, Georgina
Ruiz, Elisa
Gonzalez, Margarita
Rivera, Aida
Santiago, Carmen
Santiago, Annie
Ruiz, Carmen
Medina, Ruth

April 30 Friday

Cortes, Milagros

Saturday 1 May

May 2 Sunday

Monday 3 May

Serrano, Georgina
Colon, Emilia
Irizarry, Carmen

Arroyo, Doris
Cortes, Milagros
Salgado, Adria
Creque, Lucilda
Ortiz, Carmen
Brito, Esther,
Stapleton, Deidre
Pena, Elena
DeJesus, Gloria
Rivera, Aika
Santiago, Annie
Santiago, Efram
Cruz, Angelina
Alvarado, Martha
Ramos, Maria
Geneva-Gomez
Rivera, Alice
Rojas, Francisca
Santiago, Carmen
Velez, Zulma

May 6 Thursday

Creque, Lucilde
Santiago, Efram
Santiago, Annie
Cruz, Lucia
Pena, Elena
Cases, Carmen
Arroyo, Doris
Berrios, Carmen
Garcia, Gladys
Orta, Arnie
Colon, Emilia
Ortiz, Carmen
Cortes, Milagros
Alvarado, Martha
Gerena-Gomez

Brito. Esther
Gonzalez. Margarita
Cruz. Angelina
Rivera. Alice
Santiago. Justin
Cruz. Yolanda
Velez. Zulina

Friday 7 May

May 10 Monday

Cortes. Milagros
Brito. Esther
DeJesus. Gloria
Perez. Eneida
Cruz. Angelina
Gerena-Gomez
Alvarado. Martha
Gomez. Jose
Rivera. Alxa
Rodriguez. Maria
Arroyo. Doris
Rivera. Alice
Green. Aida
Rojas. Francisca
Santiago. Carmen
Salgado. Adria

Tuesday 11 May

May 12 Wednesday

Cortes. Milagros (Galler)

Thursday 13 May

Velez. Zulma
Arroyo. Doris

DeJesus. Gloria
Orta. Annie
Rivera. Alice
Gerena-Gomez
Brito. Esther
Garcia. Gladys
Rivera. Aixa
Perez. Eneida
Rojas. Francisca
Gonzalez. Margarita
Santiago. Carmen
Cruz. Yolanda
Berrios. Carmen

May 14 Friday

Cortes. Milagros (Galler)

Saturday 15 May

May 16 Sunday

Monday 17 May

DeJesus. Gloria
Cortes. Milagros
Gerema-Gomez
Rodriguez. Maria
Orta. Annie
Cruz. Angelina
Green. Aida
Perez. Eneida
Ortiz. Carmen
Rivera. Alice
Huertas. Delia
Gonzalez. Margarita
Rojas. Francisca
Santiago. Carmen
Cruz. Yolanda

May 18 Tuesday

Wednesday 19 May

Cortes, Milagros (Galler)

May 20 Thursday

Garcia, Gladys
Perez, Eneida
Brito, Esther
Rivera, Aixa
Gonzalez, Margarita
Rojas, Francisca
DeJesus, Gloria
Orta, Annie
Santiago, Carmen

Friday 21 May

Cortes, Milagros

May 24 Monday

Rivera, Alice
Gerena-Gomez
Orta, Annie
Rivera, Aixa
Ortiz, Carmen
Cortes, Milagros
Gonzalez, Margarita
Perez, Eneida
Rodriguez, Maria
Rojas, Francisca

Tuesday 25 May

May 26 Wednesday

Thursday 27 May

Cruz, Angelina

Gonzalez, Margarita
Rivera, Aixa
Rivera, Alice
Cortes, Milagros
DeJesus, Gloria
Perez, Eneida
Santiago, Carmen

DEFENDANT'S EXHIBIT AD AT TRIAL (THE LEE AVENUE LOGBOOK)

Bordonada, Maria 4-15-70—6-9-70 Hyperarthritis
Cintron, Ana 4-20-70—4-24-70 Thor. myositis
Diaz, Gregoria 6-17-70—6-23-70 Sciatica
Espada, Hilda 4-21-70—4-30-70 Thor. Myalgia
Lee, Mabel 7-7-70—7-8-70 Torticollis
Lloyd, Burnese 4-17-70—4-23-70 Cephalgia
Ortiz, Carmen 4-17-70—4-23-70 Cerv. Myalgia
Ramos, Alice 4-13-70—4-21-70 Cephalgia
Ramos, Alicia 4-13-70—5-12-70 Cerv. Myalgia
Rodriguez, Nereida 4-13-70—4-17-70 Lumbar strain
Rodriguez, Susan 4-15-70—4-21-70 Knee sprain
Romero, Miguel 4-21-70—4-24-70 Sciatica
Ruiz, Ramon 6-1-70—7-23-70 low back
Bradley, Linda 7-23-70—8-4-76 Lumbar inyalgra
Martinez, Maria 7-22-70—9-2-70 cerv. myositis
Agostini, Jose 7-30-70—8-4-70 thoraic myalgia
Nieves, Carmen 8-1-70—9-11-70 Cephalgia
Robles, Carmen 7-13-70—8-18-70 lumb. strain
Matos, Jesusa 7-13-70—8-25-70 brach. neuritis
Lugo, Myriam 6-30-70—8-25-70 sinusitis
Negron, Ladys 6-25-70—7-24-70 cerv. myalgia
Rodriguez, Fidel 7-1-70—7-24-70 sciatica
Ortiz, Lucy 6-15-70—8-13-70 cephalgia
Acevedo, Diogenes 6-15-70—8-10-70 sciatica
Gonzalez, Pedro 8-7-70—9-8-70 brachial neuritis
Carmona, Maria 8-10-70—8-20-70 lumbar myalgia

Olmo, Ramona 8-4-70—9-24-70 cephalgia
Ortiz, Margaret 8-17-70—9-24-70 sinusitis
Sandoval, Migdalia 8-19-70—9-24-70 cephalgia
Davila, Narcisa 8-19-70—9-22-70 cervial myalgia
Negron, Ruth 8-20-70—9-28-70 cephalgia
Allen, Gloria 8-24-70—9-24-70 L/S instability
Brown, Hilton 8-24-70—8-26-70 cerv. myalgia
Rodriguez, Carmen 8-17-70—9-24-70 migraine
Lugo, Aida 9-8-70—9-25-70 migraine
Bordonada, Maria 9-8-70—10-21-70 brachial neuritis
Johns, Grace 9-15-70—9-17-70 thoracic myalgia
Jones, Bessie 8-24-70—8-27-70 lumbar myalgia
Cintron, Ana. 9-19-70—9-22-70 torticollis
Badillo, Aurales 9-18-70—9-24-70 lumbar myalgia
Figueroa, Anastasia 9-17-70—9-24-70 cerv. yalgia
Green, Virginia 9-17-70—9-29-70 cephalgia
Ortiz, Ramona 9-23-70—10-20-70 myositis
Williamson, Alice 9-23-70—10-30-70 sciatica
Frazier, James 9-29-—9-30-70 L/S instability
Garcia, Carmen 9-17-70—11-10-70 L/S myositis
Pacheco, Gloria 10-1-70—11-18-70 cephalgia
Jones, Dorothy 9-22-70—11-18-70 migraine
Ruiz, Ramon 9-24-70—11-16-70 thoracic myalgia
Cintron, Marta 10-5-70—11-19-70 lumbar myalgia
Lozano, Florinda 10-5-70—11-4-70 sciatica
Rivera, Linda 10-1-70—11-6-70 cephalgia
Graham, Mabel 10-1-70—11-16-70 cephalgia
Muniz, Mariano 10-1-70—11-18-70 L/S sprain
Ortiz, Lucy 10-1-70—11-19-70 Sciatica
Ortiz, Gloria 10-12-70—11-24-70 cephalgia
Bracer, Concepcion 10-13-70— osteoorthectomy
Chirico, Joseph 10-16—10-21-70 cerv. myalgia
Perez, A. 10-19—11-20-70 sciatica
Navarro, Juan 10-9-70—11-20-70 L/S sprain
Scrumenti, Leo 10-23—10-30-70 Lumbar, Strain
Powells, Anna 10-26—11-3-70 Cerv. myalgia
Johnson, Christine 10-20-70—11-23-70 C/D myositis
Soto, Gerardo 11-3—11-5-70 cephalgia
Valentin, Mirta 10-9-70—11-24-70 cephalgia

Tyre, James 10-1-70—11-13-70 cephalgia
Lavalle, Ana 10-30—11-5-70 cervical myalgia
Fernandez, Maria 11-2-70—12-23-70 Lumbar scolisis
Pagan, Carmen, 11-2-70—11-20-70 lumbar myalgia
Marti, Anna 11-2-70—11-30-70 cephalgia
Leder, Lydia 11-2-70—11-30-70 cerv. myalgia
Ortiz, Rosa 11-6-70—11-30-70 brochial neuritis
Ortiz, Carmen 11-2—11-23-70 &3 visits? cephalgia
Rivera, Aurea 11-24—11-29-70 cephalgia
Velez, Carmen 12-10—12-24-70 migraine
Pabon, Maria 12-16-70—2-12-71 myalgia

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1. Reyes, Jose 1-4-71—2-26-71 osteoarthritis
2. Rodriguez, Angela 1-5-71—2-16-71 lumbar myalgia
3. Alvarez, Maria 1-5-71—1-12-71 thorin myalgia
4. Allie, JoAnn 1-6-71—2-11-71 lumbar myalgia
5. Warner, Betty 1-11-71—1-15-71 cerv. myalgia
6. Gonzalez, Aida 1-11-71—2-23-71 cephalgia
7. Walker, Willie 1-18-71—2-16-71 lumbalgia
8. Lee, Beatrice 1-20-71—2-23-71 cerv. myositis
9. Phillmore, Pearl 1-20-71—3-5-71 bursitis
10. Ortiz, Lucy 1-26-71—2-4-71 &3 visits? thorain myalgia
11. Quintero, Aida 2-1-71—2-19-71 cephalgia
12. Navarro, Jose 2-15-71—2-22-71 (3 visits) cerv. nyalgia
13. Rolon, Lydia 2-11-71—2-18-71 (3 visits) cerv. myalgia
14. Pacheco, Gloria 2-15-71—3-29-71 cephalgia
15. Ramos, Gloria 2-15-71—3-30-71 bursitis
16. Maldonado, Lydia 2-22-71—3-23-71 cephalgia
17. Mendez, Martina 3-1-71—3-15-71 T. myalgia
18. Muniz, Doris 2-22-71—3-1-71 C. Myalgia
19. Perez, Ana 2-26-71— thor. myalgia
20. Perez, Rose 3-8-71— lumbalgia

239 4049

Frank, Martin
149 Harbor View So.
Law

Gerber	Napoli	Allan	Abitbol	Martin
~~GASTRO, FELIX~~	~~SANTIAGO, CARMEN~~	~~BROWN, [illegible]~~	NARDUCCI, F	~~GAILLARD, EULALIE~~
~~GAILLARD, EULALIE~~	~~TORRES, LINDA~~	CASTRO, FELIX	EASTERLING, A	
MORALES, JOSE	~~GARCIA, ESTHER~~	~~MORALES JOSE~~	VASQUEZ, E	
VEGA GEORGINA	~~DIAZ, ADELINE~~	~~MARTIN GERMAN~~		
FELICIANO, JUANITA	~~ORTIZ, LUCY~~	GUERRA, ARMANDO		
~~REBLES, GUADALUPE~~	~~ROLON, LYDIA~~			
GUERRA ARMANDO	~~WILLIAMSON, IRIS~~			
JOHNSON, SARAH	~~MARTIN, CARMEN~~			
~~EASTERLING, A.~~	~~LUNA, ARLENE~~			
NARDUCCI, F	~~BERMUDEZ, SOTERMO~~			
RIDDICK, W	~~[illegible]~~			
LUGO, MATILDA	~~TORRES, [illegible]~~			
~~SMITH, TEMEKE~~	~~VASQUEZ~~			
	~~[illegible]~~			
	~~VASQUEZ, [illegible]~~			
	~~SORO, RAMON~~			
	RIVERA, ROBT.			
	GONZALEZ, F			
	BELLINGER, V.			

35a

JUNE

GERBER	ALLAN	NAPOLI	ABITBOL	MARTIN
~~SANTIAGO, CARMEN~~	~~MOLERO, [illegible]~~	LANE, EDNA		~~[illegible]~~
~~AGUIRRE, [illegible]~~	~~FELICIANO, [illegible]~~	~~ESTERLING, [illegible]~~		~~[illegible]~~
	~~RIVERA, [illegible]~~	~~MIRANDA, [illegible]~~		LANE, EDNA
	~~AGUIRRE, [illegible]~~	~~RIVERA, [illegible]~~		
	~~SANTIAGO, [illegible]~~			
JULY ~~[illegible]~~	~~RIVERA, [illegible]~~		~~[illegible]~~	~~GONZALEZ, AURELIA~~
~~RIVERA, [illegible]~~	GONZALEZ, [illegible]		~~[illegible]~~	
~~GONZALEZ, [illegible]~~				
AUG. RIVERA, EDDIE	MALAVE, AURORA	MALAVE, AURORA	~~RIVERA, EDDIE~~	~~[illegible]~~
~~JOHNSON~~	~~JOHNSON~~	~~LOPEZ, OLGA~~	RAMOS, ISMAEL	~~[illegible]~~
~~RAMOS~~	HOLLAND	~~RODRIGUEZ, ANT.~~	~~JOHNSON~~	
~~HOLLAND~~		ROSARIO, PRIMITIVO		
~~SANTIAGO, [illegible]~~	~~[illegible], D.~~	~~BERMUDEZ, [illegible]~~		
~~MONTUFAR, JAIME~~	ROSARIO, PRIMITIVO	~~RIVERA, [illegible]~~		
" CARMELA	~~RIVERA, EFRAIN~~	~~TORRES, [illegible]~~		
~~ROMAN, MARIA~~		~~[illegible], EDWIN~~		
		~~ROSARIO, ELIZABETH~~		
		~~RIVERA, [illegible]~~		
		~~ROSARIO, [illegible]~~		
		~~ROLON, MILDRED~~		

34a

Leo Todman, M.D.
1. Jeffrey Nixon (private)
2. Jaime Montafar 9-10-71

499 1700
356 7409

APPENDIX C—Defendant's Exhibit B at the hearing on the motion for a new trial (the notes of AUSA George Wilson)

File July 29, 1976

George E. Wilson

United States v. Kavaler — S 76 Cr. 241

On July 23, 1976 immediately after my summation-in-chief in this case, a recess was called. Jack Hartwig advised me that Dr. Alezadeh and his assistant Mrs. Silva were outside the courtroom. Mrs. Silva had reported that she thought she had testified falsely by saying that she saw Kavaler work at the Lee Avenue Clinic in 1972 and 1973.

During the recess I and Jack Hartwig met with Dr. Alezadeh and Mrs. Silva in the witness room. I showed her her testimony on cross by Mr. Esbitt (which only dealt with whether she had seen Kavaler during this period). Mrs. Silva, after reading her testimony appeared to be relieved that she had not testified falsely and it was apparent that she was mistaken in her recollection of the questioning by Mr. Esbitt. Having satisfied myself that Mrs. Silva's present recollection was not at odds with her testimony, I returned to court which was reconvening.

G.E.W.

APPENDIX D — Affidavit of John Hartwig in opposition to Kavaler's motion for a new trial

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

MAX KAVALER,

Defendant.

S 76 Cr. 241 (CLB)

STATE OF NEW YORK—COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

JOHN E. HARTWIG, being duly sworn, deposes and says:

1. I am assigned to the Medicaid fraud investigation in the office of the United States Attorney for the Southern District of New York.

2. On July 28, 1976 I happened upon two Government witnesses in *United States v. Kavaler* — Dr. Hamid Alizadeh and Mrs. Gloria Silva — in the lobby of the United States Courthouse Annex, One St. Andrew's Plaza. Dr. Alizadeh stated that Mrs. Silva wanted to speak to the judge because she thought that she may not have stated the truth the previous day during her testimony. Mrs. Silvs said she thought she had stated that Dr. Kavaler worked at the Lee Avenue clinic during 1972 and 1973 when in fact she had recalled since testifying that he did not.

3. I took them to the courthouse to speak to George E. Wilson, the Assistant United States Attorney in charge of the case. I arrived just as the court was taking a recess after

the Government's closing argument and informed Mr. Wilson that Mrs. Silva wanted to speak to him and why.

4. Mr. Wilson produced the transcript of her testimony and showed it to her. He asked her what her problem was. Mrs. Silva said when the "old man" asked she said he worked there. Mr. Wilson showed her Mr. Esbitt's cross-examination in the transcript. She read it and it was pointed to her by Mr. Wilson that she had merely told Mr. Esbitt that she had seen Dr. Kavaler during 1972 and 1973.

5. After it appeared that she was satisfied that she had not lied Mr. Wilson asked her if she had anymore problems and if she still wanted to see the judge. Mrs. Silva said no. Mr. Wilson left the transcript with me and returned to court which was reconvening. I again asked Mrs. Silva if she felt better now that she had read the transcript. She said she did.

6. At no time did I or Mr. Wilson attempt to intimidate or shout at Mrs. Silva. Mr. Wilson advised Dr. Alizadeh that it was a serious offense to tamper with witnesses and that he hoped that Mrs. Silva was not trying to change her testimony because of something that Dr. Alimadeh had told her.

7. On September 14, 1976 I spoke to Dr. Alizadeh by telephone. He told me that after the trial Dr. Kavaler had called Mrs. Silva once or twice and told her that "she should say different".

.....
JOHN E. HARTWIG

Sworn to before me this
day of September, 1976

No. 76-1152

Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX KAVALER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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MAX KAVALER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The oral opinion of the district court (Pet. App. 3a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 20, 1977. The petition for a writ of certiorari was filed on February 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial because the prosecutor failed to correct a witness's testimony after the close of the evidence, where the testimony was

substantially correct and peripheral to the issue of guilt or innocence.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to file false claims in connection with services allegedly rendered to patients in administering the Medicaid Act, in violation of 18 U.S.C. 371, and of 13 substantive counts of presenting false claims to the government in connection with services allegedly rendered, in violation of 18 U.S.C. 287. Petitioner was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

1. In 1969 petitioner, in association with two other chiropractors, Joseph Ingber and Sheldon Styles,[1] practiced in Jamaica, New York. Ingber and Styles testified that in the course of treatment the three prepared fraudulent treatment plans for submission for reimbursement under Medicaid (Tr. 33-36, 185-187) and that more than one-half of the plans they submitted bore no relationship to the actual services rendered to their patients (Tr. 36). Two office assistants testified that they also prepared treatment plans and invoices for the doctors; they estimated that 50 to 75 percent of these were false (Tr. 51, 397, 424).

Petitioner, Ingber and Styles expanded their practice to include clinics in Brooklyn and Queens, and they established associations with other doctors (Tr. 59, 66-68, 212-214). Two of these other doctors, who participated in the conspiracy, testified at trial about petitioner's involvement in the fraudulent scheme (Tr. 435-436, 439, 499, 513, 559). In addition, 15 of petitioner's patients testified that treatments itemized on plans and invoices submitted by petitioner, and for which he received payment, were not given (Tr. 459, 582-591, 594-597, 611-614, 626-627, 644, 655-656, 663-664, 686, 699, 728, 736, 745, 753, 761).

[1]Ingber and Styles are imprisoned following their pleas of guilty to Medicaid fraud; Styles also is serving a term of imprisonment for income tax evasion.

Petitioner testified in his own behalf. He denied participating in the conspiracy or submitting any false claims. In support of this testimony, petitioner introduced two office diaries. He stated that these diaries covered the period of the conspiracy, and if their descriptions of treatments were accurate they would have established that petitioner provided the treatments for which he received payment (Tr. 1046-1048). Entries relating to the Lee Avenue Clinic ended on May 27, 1971; petitioner testified that he did not work there after that date (Tr. 1104-1105).

In rebuttal, Dr. Hamid Alizadeh, the administrator of the Lee Avenue Clinic, and Gloria Silva, his secretary, testified that they received rent checks for office space in the Clinic, signed by petitioner, through 1973 (Tr. 1257, 1270, 1274). Silva stated that she saw petitioner at the Clinic in 1972 and 1973, but she was not certain that she saw him actually working there (Tr. 1281, 1283).

2. Following his conviction, petitioner filed a motion for a new trial. This motion asserted that Silva had misrepresented petitioner's presence at the Lee Avenue Clinic after 1971, and that the prosecutor was aware of this misrepresentation. The facts relevant to this claim were brought out in a hearing on the motion. Silva, who was called primarily to verify the receipt of rent payments in 1972 and 1973 from petitioner for the Lee Avenue Clinic, was asked by the prosecutor at trial (Tr. 1281-1282):

> Q. Have you seen him [petitioner] around the clinic?

A. Yes.

Q. Have you seen him on nights and days when he treated patients?

A. I seen him on days.

Q. When do you recall was the last year you saw him?

A. The last time I saw him?

Q. Yes.

THE COURT: The last time you saw him treating patients is what the question was.

A. I'm not too sure, '73, '72.

Q. '72 or '73?

A. Yes.

Q. The last payment you saw was January of '74, do you remember him treating patients then?

A. Could be.

MR. WILSON: Your witness.

Defense counsel asked Silva on cross-examination (Tr. 1283):

Q. You said could be, are you positive under oath that you saw him in 1973?

A. Yes, I did.

Q. And in '72?

A. '72, possibly.

Q. And '71?

A. '71, I did.

The following day Silva returned to the courthouse, concerned that she testified falsely under cross-examination that she had seen petitioner *working* at the Clinic after May 1971 (H. Tr. 13-15).[2] She met with the prosecutor and explained her concern. He then showed her a transcript of her testimony on cross-examination; the transcript revealed that she had not testified that she saw petitioner working at the Clinic in 1972 and 1973. Armed with this knowledge, Silva decided not to pursue the matter with the judge (H. Tr. 18-20, 29-32, 83). The prosecutor, convinced that Silva had not testified falsely, prepared a file memorandum about the incident but took no further action (H. Tr. 73).

3. The district court denied petitioner's motion for a new trial. The court found that Silva testified truthfully at trial (Pet. App. 4a), that the prosecutor acted properly (Pet. App. 7a), and that in any event the testimony was "purely peripheral" and did not affect the outcome of the trial, petitioner's guilt having been overwhelmingly established (Pet. App. 6a). The court of appeals affirmed, observing that "there is no reasonable likelihood that the corrected version of [Silva's] testimony would have altered the outcome of the trial in view of the overwhelming evidence" (Pet. App. 2a).

ARGUMENT

Petitioner argues that the prosecutor withheld knowledge of a material falsehood by a witness who desired to recant. As both lower courts found, however, Silva did not testify falsely, her testimony could not have affected the jury's verdict, and the prosecutor did not act improperly.

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[2] "H. Tr." designates the transcript of the hearing on the motion for a new trial.

There is no need for this Court to review these factual findings, concurred in by two lower courts.

Silva testified that she was "not too sure" whether petitioner actually worked in the Lee Avenue Clinic during 1972 and 1973, and that it "could be" that he had worked there, since she had seen him there and he paid rent for an office during those years. Silva reviewed this testimony by reading the transcript; having done so, she did not express any desire to alter it. The prosecutor stated during closing argument that Silva had testified that her "best recollection [was] that [petitioner] worked [in the Lee Avenue Clinic] as late as" 1973 (Tr. 1341-1342). Although that summary was vague, it was not inconsistent either with Silva's testimony or with what Silva had told the prosecutor afterward. After a full airing of the matter in the district court, that court concluded that these facts would not have led it to reopen the case for further testimony by Silva even if the matter had been brought to the court's attention prior to the submission of the case to the jury (Pet. App. 6a).

Assuming *arguendo* that Silva's testimony was misleading concerning the strength of her recollection whether she had seen petitioner working at the Clinic in 1972 and 1973, that the prosecutor improperly allowed this impression to go uncorrected, and that the strictest standards should be applied, we submit that petitioner would be entitled to no relief. The conviction should be set aside only if there were a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (footnote omitted). That standard was not met here. Fifteen of petitioner's former patients testified that they did not receive the treatments for which petitioner obtained payments; four fellow doctors or chiropractors testified that petitioner participated in a scheme to submit fraudulent treatment plans and invoices; two secretaries corroborated the details

of this conspiracy. Silva's equivocal testimony had only the most marginal significance, and its truth or falsity did not bear on the jury's verdict.[3] See also *Giglio* v. *United States*, 405 U.S. 150, 154; *Napue* v. *Illinois*, 360 U.S. 264, 271.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
SARA CRISCITELLI,
Attorneys.

APRIL 1977.

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[3]Petitioner contends (Pet. 18) that Silva's testimony, if believed, would contradict his own and thus undermine his credibility. But a parade of other witnesses also had contradicted petitioner's testimony, and they (unlike Silva) had directly implicated petitioner in the frauds he was charged with committing. Moreover, Silva's testimony was qualified by her expressed uncertainty, an uncertainty that petitioner's counsel could have further explored on cross-examination. Whatever additional effect Silva's testimony may have had upon petitioner's credibility is not enough, under the standards of *Agurs*, to require a new trial.